IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 13TH DECEMBER 2007 / 22ND AGRAHAYANA 1929

WP(C).No. 36999 of 2007(D)

AGAINST THE ORDER IN EP. 459 /2005 IN
OS.1017/1994 of II ADDL.SUB COURT,TRIVANDRUM

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PETITIONER:

KARUNAKARAN, S/O. KESAVAN, AGED 72 YRS
MOOLAYIL THALEKKAL VEEDU, KARIMANAL P.O.
MULATHOOR, THIRUVANANTHAPURAM

BY ADV. SRI.D.GANESH KUMAR
SMT.KAVITHA.K.I.

RESPONDENTS:

KESAVAN NADAR, S/O MADHAVAN NADAR
PARATHAPPARA PUTHEN VEEDU
KADAMBANADU MURI, ARUVIKKARA VILLAGE
THIRUVANANTHAPURAM

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 13/12/07, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N.KRISHNAN, J

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W.P.(C) No.36999 OF 2007

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Dated this the 13th day of December 2007

JUDGMENT

This writ petition is filed seeking to set aside Ext.P7 order passed in Ext.P6 application and also the order dated 17.11.2007 of issuing warrant. The execution petition is filed with a prayer to realise the decree debt by sale of the property after issuing notice and in case of non satisfaction of the decree amount to proceed under Order 21 Rule 37 and to realise the decree amount. Learned counsel for the petitioner submits that Order 21 Rule 66 notice has been issued and as the claimant has entered appearance and at that stage on a request made by the counsel for the decree holder the court has ordered arrest of the judgment debtor without even finding out the means and therefore the order passed on 17.11.2007 is invalid in law and the further direction given on the basis of Ext.P6 application to pay Rs.50,000/- to the decree holder is invalid in law. It is true that simultaneous execution of a decree is permissible, but when the execution petition itself, indicates that the amount has to be realised by sale of the property and that only on non-satisfaction of the entire decree by virtue of

the sale of the property to proceed under Order 21 Rule 37 the court should not have resorted and issued arrest warrant merely at the request of the counsel for the decree holder. It is against the very prayer in the execution petition. Further in any case of arrest under Order 21 Rule 37, the means have to be proved and when the property through which the amount can be raised is under attachment by the very same court unless the court gives cogent reasons, it shall not send the judgment debtor to prison even without giving him an opportunity to put forward his contentions regarding arrest. Therefore, the orders passed by the court below on 17.11.2007 as well as on 30.11.2007 suffer from serious infirmity and it has to be interfered with.

Therefore, I direct the court not to proceed with the detention of the judgment debtor in civil prison but, direct the court to first exhaust the remedy which is prayed for by the decree holder in the E.P., i.e. by sale of the property mentioned in the E.P. and only non satisfaction of the decree debt then proceed personally against the judgment debtor as prayed for in the E.P.

Writ petition is allowed as above.

M.N.KRISHNAN, JUDGE

Cdp/-